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No. 94-1102

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

PAUL E. SPRAGENS,
Petitioner,

v.

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Congress' purpose in enacting the Americans With Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Id.* § 12101(b)(1). By expressly finding in the ADA that classifications drawn on the basis of disability are inherently suspect, see *id.* § 12101(a)(7), Congress plainly intended for the judiciary to participate in that "national mandate" by applying heightened scrutiny to such classifications in equal protection cases. This is an issue of obvious significance and one that has divided the lower courts.

This Court should therefore grant certiorari in this case to consider the substantial arguments supporting petitioner's position. See *Heller v. Doe,* 113 S. Ct. 2637, 2650 n.1 (1993) (Souter, J., dissenting); James B. Miller, Note, *The Disabled, The ADA, & Strict Scrutiny,* 6 St. Thomas L. Rev. 393 (1994); Neil D. O'Toole, *The ADA: Strict Scrutiny Protection for Disabled Workers,* 21 Colo. Law. 733 (1992); Timothy Cook, *The Americans With Disabilities Act: The Move to Integration,* 64 Temple L. Rev. 393, 437-39 (1991); *Martin* v. *Voinovich,* 840 F. Supp. 1175, 1210 (S.D. Ohio 1993); see also Pet. 8-9.

a. The government argues that § 12101(a)(7) of the ADA is merely a "prefatory congressional finding" (Br. in Opp. 14) that does not "direct courts to do anything" (*id.* at 13). This completely misjudges the significance of Congress' findings in § 12101(a)(7) and of the ADA as a whole. This Court's equal protection jurisprudence, of which Congress is well aware, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), establishes that suspect classifications receive heightened scrutiny under the Fifth and Fourteenth Amendments. Under this Court's cases, whether or not a classification is inherently suspect is essentially a factual and historical question and in enacting the ADA, Congress determined that disability-based classifications are "suspect" within the meaning of this Court's jurisprudence. See 42 U.S.C. § 12101(a)(7). Congress is particularly qualified to make such a finding because it was acting pursuant to is power under Section 5 of the Fourteenth Amendment. See *Fullilove* v. *Klutznick,* 448 U.S. 448, 476-78 (1980); *Katzenbach* v. *Morgan,* 384 U.S. 641, 651 (1966); 42 U.S.C. § 12101(b)(4). Accordingly, after finding that the disabled are a suspect class, Congress did not need to tell the courts to "do anything" because the Constitution itself already commands the judiciary to enforce the right of equal protection and this Court's heightened scrutiny cases already dictate the terms of that protection. Congress'

finding in § 12101(a)(7) thus triggers heightened scrutiny of disability classifications under the Constitution and this Court's precedents.

This analysis is confirmed by *Frontiero* v. *Richardson,* 411 U.S. 677 (1973). There, this Court accepted the argument that sex-based classifications are "inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682. The Court's decision was guided in significant part by Congress' adoption of Title VII and the Equal Pay Act. Neither of those laws "told" the courts to apply heightened scrutiny to sex classifications; rather, the two laws demonstrated that "Congress itself has concluded that classifications based on sex are inherently invidious." 411 U.S. at 687. Precisely the same is true here. Indeed, the argument that the ADA requires heightened scrutiny is even stronger than the parallel argument accepted in *Frontiero* because the ADA contains an explicit congressional finding that the disabled are a suspect class. In sum, the government's claim that the ADA does not tell the judiciary to apply heightened scrutiny entirely misses the point. The point is that the very adoption of the ADA provides the "controlling congressional direction" that was absent in *City of Cleburne* v. *Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439 (1985), was present in *Frontiero,* and is now present here.[1]

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[1] That "the substantive provisions of the ADA do not apply to the administration of the Social Security disability program" (Br. in Opp. 14) is irrelevant. Congress certainly made no finding in the ADA that the "history of purposeful unequal treatment" of the disabled excludes the federal government. 42 U.S.C. § 12101(a)(7). Indeed, Congress has expressly applied the ADA to the federal government to the extent consistent with its obligation to respect principles of separation of powers. See Congressional Accountability Act of 1995, §§ 102(a)(3), 201(a)(3), 505, Pub. L. No. 104-1 (Jan. 23, 1995) (applying the ADA to Congress and other legislative branch institutions and instructing the Judicial Conference to prepare a report on the application of the ADA to the federal judiciary).

b. The government also argues that Section 5 does not "provide[ ] a basis for applying heightened scrutiny in this case" because "[t]his case concerns a *federal* statute and regulations; the equal protection mandate of the Fourteenth Amendment, however, is directed to the *States*." Br. in Opp. 14. In the first place, this is completely inconsistent with the position taken by the Solicitor General in *Adarand Constructors, Inc.* v. *Peña,* No. 93-1841 (pending). There, on page 38 of his main brief, the Solicitor General states that "[p]etitioner errs in contending that Congress's Section 5 powers are not relevant here because this case 'involves a federal program implemented by a federal agency' and 'no state or local government is involved.' " One would have thought that the Solicitor General would observe a modicum of consistency in his submissions to this Court, at the very least in cases falling within the same Term. In any event, the position taken here by the Solicitor General is wrong: " 'This Court's approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment.' " *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,* 483 U.S. 522, 542 n.21 (1987) (quoting *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975)). See also *United States* v. *Paradise,* 480 U.S. 149, 166 n.16 (1987); *Buckley* v. *Valeo,* 424 U.S. 1, 93 (1976). If a classification is suspect under the Fourteenth Amendment, it is also suspect under the Fifth. That proposition was established in *Bolling* v. *Sharpe,* 347 U.S. 497 (1954), and cannot now be doubted.

c. The government seeks to defend the discrimination at issue here on the ground that it involves "a distinction *within* the class of disabled persons" (Br. in Opp. 15). But discrimination in favor of one category of disabled persons over another is just as unacceptable under the ADA and just as deserving of heightened scrutiny as is discrimination in favor of the non-disabled over the disabled. Pet. 9 n.5. The ADA

forbids and makes actionable discrimination "between persons with different handicaps" as well as "between handicapped persons and non-handicapped persons." *Martin* v. *Voinovich, supra*, at 1191; see also *id.* at 1192.

Furthermore, this Court has held in a virtually identical context that discrimination between subclasses of persons belonging to the same suspect class warrants heightened scrutiny. In *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974), the Court applied heightened scrutiny to, and invalidated, a provision of the Social Security Act that "discriminate[d] between . . . two subclasses" of illegitimate children in the award of benefits. *Id.* at 636. As then-Justice Rehnquist observed in dissent, the Court did not "strik[e] down the legislation on the basis of discrimination between legitimates and illegitimates" (*id.* at 638) but did so -- after applying "some form of stricter scrutiny" -- because the "discrimination [was] between classes of illegitimates." *Id.* at 639. In this case, as in *Jimenez,* the Social Security Act discriminates in the award of benefits between two subclasses of persons who fall within a single suspect class. It therefore deserves heightened scrutiny. See also *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972).

d. The government's contention (Br. in Opp. 12) that petitioner's ADA argument is not properly presented in this Court is wrong. As this Court stated just last month, the "traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National Railroad Passenger Corp.,* No. 93-1525 (Feb. 21, 1995) (quoting *Yee* v. *Escondido,* 112 S. Ct. 1522, 1532 (1992)). In *Lebron,* the "federal claim" was a violation of the Free Speech Clause; in *Yee*, it was a violation of the Takings Clause. Here, petitioner's claim -- which was indisputably raised in both lower courts -- is that his right to equal protection under the Due Process Clause of the Fifth Amendment has been violated. The contention that the ADA requires

heightened scrutiny is plainly an "argument in support of that claim."

In any case, a claim of some form of heightened scrutiny was expressly made by petitioner is both lower courts. In the district court, petitioner suggested in his *pro se* motion for summary judgment that "the discrimination under discussion should be examined under a standard of heightened scrutiny." C.A. App. 24A. And in the court of appeals, petitioner argued for a heightened "*Cleburne*" style of review and cited in support of that argument Congress' finding in the ADA, 42 U.S.C. § 12101(a)(7), that the disabled are a discrete and insular minority. Pet. C.A. Br. 13-15. Both lower courts, moreover, considered the question whether a standard of review "more exacting" than rational basis review should apply. Pet. App. 5a, 17a. Indeed, the government expressly acknowledged in the court of appeals that the heightened scrutiny argument was raised by petitioner. See Gov't C.A. Reply Br. 1 ("Plaintiff argues that the statute in this case is subject to a heightened standard of review."). Accordingly, that argument is properly presented in this Court.

Heller v. *Doe*, *supra*, is not to the contrary. In *Heller*, this Court refused to consider a "heightened scrutiny argument" pressed by respondents because they raised that argument "for the first time *in their merits brief* in this Court" and (it because) would have been "unfair" to allow respondents to raise the argument "at th[at] stage in the litigation." 113 S. Ct. at 2642 (emphasis added). Neither of those things can be said in this case. *Heller* thus does not control here.

2. The government concedes (Br. in Opp. 14 n.11) that the decision below conflicts with *Martin* v. *Voinovich*, *supra*, and does not dispute our submission that the decision below "is in square conflict" (Pet. 13) with *McGuire* v. *Switzer*, 734 F. Supp. 99 (S.D.N.Y. 1990). The government instead argues that this Court does not review conflicts between courts of appeals and district courts. Yet in *Travis* v. *United States*, 385 U.S.

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491 (1967), this Court noted that "[w]e granted certiorari in light of the important questions raised by petitioner, and the apparent conflict with the decision of the District Court for the Eastern District of New York in the *Laub* case, *supra*, which we affirm today." *Id.* at 492 (referring to *United States* v. *Laub,* 385 U.S. 475 (1967)). As in *Travis,* this case both raises important questions, see Pet. 6-15, and involves a conflict among the lower federal courts.[2]

In any event, the decision below also conflicts with the decisions of the United States Court of Appeals for the Ninth Circuit in *Pruitt* v. *Cheney,* 963 F.2d 1160, cert. denied, 113 S. Ct. 655 (1992); and *High Tech Gays* v. *Defense Indus. Security Clearance Office,* 895 F.2d 563 (1990) -- cases in which the Ninth Circuit "read *Cleburne* to require greater scrutiny than normally accorded under rational basis review." Br. in Opp. 8. The government's claim that these cases are no longer good law in the Ninth Circuit after *Heller* v. *Doe,* is simply incorrect. See, *e.g., Jackson* v. *Brigle,* 17 F.3d 280, 284 (9th Cir.), cert. denied, 115 S. Ct. 187 (1994); *Tovar* v. *U.S. Postal Service,* 3 F.3d 1271, 1278 (9th Cir. Aug. 31, 1993); *Cammermeyer* v. *Aspin,* 850 F. Supp. 910, 917 (W.D. Wash. 1994) ("The defendants' contention that *Pruitt*'s vitality has been extinguished by *Heller* is without merit") (citing *Jackson* v. *Brigle*).

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[2] Furthermore, the federal courts continue to struggle with the effect of the ADA upon the standard of review in equal protection cases. See *Kessler Inst. for Rehab., Inc.* v. *Mayor & Council of the Borough of Essex Fells,* No. 94-2361, 1995 WL 42916, *18 (D. N.J. Jan. 31, 1995) (noting that Congress has made a "finding that disabled persons are a 'discrete and insular minority,' 42 U.S.C. § 12101(a)(7), a phrase that has traditionally been associated with strict scrutiny" but following Third Circuit precedent calling for rational basis review of disability classifications); *Lee* v. *Oregon,* 869 F. Supp. 1491, 1497 (D. Ore. Dec. 27, 1994) (posing but not reaching the question: "Are persons who have a terminal disease disabled for purposes of the Americans With Disabilities Act and if so, does this means they are a suspect class?").

3. Although we believe that heightened scrutiny should be applied in this case, the government's preference for the blind over petitioner cannot survive even rational basis review. Tellingly, the government does not dispute that petitioner's condition is every bit as disabling as blindness; nor does it even attempt to argue that it is rational for the government to treat petitioner differently than the blind. Instead, the government argues that as-applied equal protection cases "do not require a court to consider whether a classification is rational in light of a particular individual's circumstances; it is the rationality of the distinction between categories that is important." Br. in Opp. 10 n.7.[3] This misconstrues the difference between facial and as-applied equal protection challenges.

Cleburne establishes that a statute can fail the rational basis test either on its face or in its specific application. The court of appeals in that case invalidated the city ordinance at issue both facially and as applied; this Court, however, ruled only on the latter ground. See *Cleburne,* 473 U.S. at 438, 447. The government thus errs in claiming that in an as-applied case it is only "the distinction between categories that is important" for the rationality of that distinction, the relevant issue in a facial challenge. In an as-applied case, as this Court has said, an equal protection violation is established by "show[ing] that the statute as applied to a particular [person] is without support in reason because the [person], although within the prohibited class, is so different from others of the class as to be without reason for the prohibition." *United States* v. *Carolene Products Co.,* 304 U.S. 144, 153-54 (1938). Here, it is clear, and the government does not contend otherwise, that the preference for the blind "as applied to [petitioner in] particular" is "without support in reason." *Ibid.* That fact is enough to sustain petitioner's claim. The evident

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[3] The government acknowledges that petitioner's challenge was brought on an as-applied basis. Br. in Opp. i.

confusion of the government and court of appeals as to the proper mode of analysis in as-applied equal protection cases provides an additional reason for this Court to review the decision below.

But even if the government were correct in its focus upon "the distinction between categories," the preference for the blind would still be irrational. The government argues, as did the court of appeals, that Congress could reasonably conclude that the blind suffer greater financial hardship than do other disabled persons, emphasizing in particular the rate of unemployment among the blind. Br. in Opp. 10-11 & n.8. But the government does not dispute the evidence -- which has been accepted by the EEOC -- showing an identical unemployment rate for *all* disabled persons. See Pet. 19 (citing *inter alia* 56 Fed. Reg. 8578, 8581 (1991) (EEOC notice of proposed rulemaking under the ADA)). Congress cannot "reasonably conclude" that the blind face greater financial hardship than other disabled persons when, in fact, that conclusion is simply not true.

4. In this case, the government determined that, by earning more than $3,600 in 1986 notwithstanding his severe disability, petitioner: (1) forfeited over $6,000 in Social Security benefits in that year alone; (2) is henceforth ineligible for benefits (as he is no longer even "deemed" disabled); and (3) must return (per a demand made in 1995) over $34,000 in benefits received as long as eight years ago. None of this would have happened had petitioner's disability been blindness instead of arthrogryposis. The conclusion of the court of appeals that this mindless result is subject to nothing more than rational basis review -- and is in fact rational -- should be reviewed by this Court.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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